KESAVAN PETCHAYO

v.

PP

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CRIMINAL APPEAL NO: W-05-48-1999]
22 JULY 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Rule against double presumptions - Whether judgment of trial judge showed that he relied on double presumptions to convict accused of trafficking - Whether conviction unsafe - Whether conviction under s. 39B(1)(a) should be substituted with one under s. 12(2) read with s. 39A(2) - Whether self-incriminating statement justly admitted - Dangerous Drugs Act 1952, s. 37(d), (da)*

EVIDENCE: *Statement - Self-incriminating statement - Statement made by accused upon arrest - Whether more prejudicial than probative - Whether technically admissible - Whether trial judge should have excluded statement - Whether arresting officer should have made contemporaneous note of alleged statement in investigation diary or police report - Dangerous Drugs Act 1952, s. 37A*

This was an appeal from the judgment of the High Court convicting the accused/appellant under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and sentencing him to death for trafficking in 11.8g of heroin and 5.2g of monoacetylmorphines. The principal grounds of appeal advanced in the accused's behalf were: (i) that the trial judge should not have admitted the statement allegedly made by the accused ('the statement') at the scene of the incident. (The accused was alleged to have fallen at the feet of the arresting officer, weeping and pleading, denying ownership of the seized packages.) It was submitted that the statement was revealed for the very first time at the trial, and that the arresting officer had not mentioned it to his immediate superior or referred to it in his police report or in any documents whatsoever; and (ii) that the trial judge had transgressed the rule against double presumptions as enunciated in *Muhammed Hassan v. PP* [1998] 2 CLJ 170.

Held:
Per Gopal Sri Ram JCA

[1a] The arresting officer should have made a contemporaneous note of the statement in his investigation diary or in his police report, which could then be used by him to refresh his memory under s. 159 of the Evidence Act 1950. This would have been of considerable evidential value to satisfy the court that his recollection of the events was accurate. It was, therefore, in the circumstances, incumbent upon the trial judge to have approached the statement with utmost caution. (p 850 b-e)

[1b] Although the statement was technically admissible its prejudicial effect far outweighed its probative value, and the purpose for which it was sought to be admitted was of little consequence in the light of the other evidence tendered by the prosecution to show possession. It would be unjust to admit evidence of a character gravely prejudicial to the accused even though there might be some tenuous ground for holding it technically admissible. The trial judge should have exercised his discretion and excluded the statement as being contrary to justice. (pp 850 h, 851 a-e & 852 b-c)

[2] From his grounds of judgment, it was clear that the trial judge had infringed the rule against double presumptions by stacking the presumption of trafficking (s. 37(da) DDA) upon the presumption of possession (s. 37(d) DDA). The conviction of the accused under s. 39B(1)(a) of the DDA was, therefore, unsafe. (p 853 b-e)

[Appeal allowed; conviction under s. 39B(1)(a) set aside and substituted with one under s. 12(2) read with s.39A(2) DDA; accused sentenced to 18 years' imprisonment and 10 strokes of the rattan.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah satu rayuan daripada penghakiman Mahkamah Tinggi yang mensabitkan tertuduh/perayu di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan menjatuhkan hukuman mati ke atasnya setelah didapati bersalah mengedar 11.8g heroin dan 5.2g monoacetylmorphines. Alasan utama rayuan yang diutarakan bagi pihak tertuduh adalah: (i) bahawa hakim perbicaraan tidak patut menerima pernyataan yang dikatakan dibuat oleh tertuduh ('pernyataan itu') di tempat insiden berkenaan. (Perayu dikatakan telah merebahkan diri ke kaki pegawai penangkap, menangis serta merayu, sambil menafikan pemilikan bungkusan yang dirampas). Dihujahkan bahawa kenyataan itu telah didedahkan untuk kali pertamanya hanya semasa perbicaraan, dan pegawai penangkap tersebut tidak menyebutnya kepada pegawai atasannya atau

merujuknya dalam laporan polis atau apa-apa dokumen lain; dan (ii) bahawa hakim bicara telah mengingkari rukun andaian berganda seperti yang dijelaskan dalam *Muhammed Hassan v. PP* [1998] 2 CLJ 170.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1a] Pegawai penangkap sepatutnya membuat nota tentang pernyataan yang dibuat di dalam diari siasatannya atau dalam laporan polisnya secara serentak, di mana ia boleh digunakan untuk tujuan mengimbas kembali di bawah s. 159 Akta Keterangan 1950 ('Akta'). Ini akan mengukuhkan nilai keterangannya dalam usaha meyakinkan mahkamah bahawa imbasannya terhadap kejadian yang berlaku adalah tepat. Oleh yang demikian, hakim bicara berkewajipan untuk bersikap was-was dalam pendekatannya terhadap pernyataan tersebut.

[1b] Meskipun pernyataan itu secara teknikalnya boleh diterimapakai, namun kesan mudarat jauh mengatasi nilai probatifnya, dan tujuan memasukkannya sebagai keterangan menjadi tidak penting mengambilkira bukti-bukti lain yang dikemukakan pihak pendakwa bagi membuktikan milikan. Adalah tidak adil untuk menerimapakai keterangan yang memudaratkan kepada tertuduh walaupun wujud alasan-alasan lemah yang secara teknikal membolehkannya diterimapakai. Hakim bicara sepatutnya menggunakan budibicaranya menolak pernyataan tersebut yang bertentangan dengan keadilan.

[2] Daripada alasan penghakimannya, adalah jelas bahawa hakim bicara telah mengingkari rukun andaian berganda dengan melonggokkan andaian mengedar (s. 37(da) ADB) di atas andaian milikan (s. 37(d) ADB). Sabitan tertuduh di bawah s. 39B(1)(a) ADB adalah, dengan itu, tidak selamat.

[Rayuan dibenarkan; sabitan di bawah s. 39B(1)(a) diketepikan dan digantikan dengan sabitan di bawah s. 12(2) dibaca bersama s. 39A(2) ADB; tertuduh dihukum penjara 18 tahun dengan 10 sebatan rotan.]

Case(s) referred to:
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(foll)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Noor Mohammad v. King [1949] AC 182 ***(foll)***
Tengku Mahmood v. PP [1974] 1 MLJ 110 ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37A, 37(d), (da), 39A(2)(a), 39B
Evidence Act 1950, s. 159

For the appellant - Karpal Singh (M Sathia); M/s Karpal Singh & Co
For the respondent - Nik Ahmad Marzuki Nik Mohamad DPP

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-5-99]

Reported by Gan Peng Chiang

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

On 23 June 1998 at 4.35pm, a police party led by PW3, laid an ambush at Jalan Jambu Golok, Taman City, Jalan Kuching, Kuala Lumpur. They were acting on certain information, which they had earlier received. Later, the appellant, who was carrying two packages under his arm, came to the scene. He went to a telephone booth where he made two telephone calls. The appellant was apprehended by the police. The two packages he was carrying with him were taken away.

Their contents were sent for chemical analysis. This revealed that the packages contained 11.8 grammes of heroin and 5.2 grammes of monoacetylmorphines. The appellant was subsequently charged for the offence of trafficking under s. 39B of the Dangerous Drugs Act 1952 ("the Act"). He was tried on the charge, found guilty, convicted and the mandatory death penalty was imposed upon him. The present appeal is directed against that conviction.

Mr. Karpal Singh who appeared for the appellant, had raised grounds which, he submits, amount to a serious misdirection on the part of the trial judge. The first relates to the evidence of the chemist. The second is directed at the admissibility of a statement allegedly made by the appellant at the scene of the incident. The third relates to what has come to be known as the rule against presumption upon presumption or the rule in *Muhammed Hassan* (see *Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170 FC).

As to the first ground, the complaint here is that PW2, the chemist, did not advert to the weight of the samples he took for purposes of carrying out his qualitative analysis of the substance in question. We have scrutinized the evidence of the chemist with care and we do not find any merit in the complaint made by counsel. The evidence sufficiently establishes beyond a reasonable doubt that for the purpose of analysis, a sufficient sample was taken of the substance in question in order to establish that it was indeed heroin and monoacetylmorphine, respectively.

As to the second ground, a brief recital of the relevant facts is necessary to appreciate the point that is being sought to be made. Now it is the prosecution's case that immediately upon being accosted by the police and the packages being removed from his possession, the appellant fell at PW3's feet, wept, pleaded for help and said that the packages did not belong to him. The learned judge admitted this evidence. It has been submitted that he did so in error.

It is significant, and this was noted by the learned judge, that PW3 had not referred to this alleged statement by the appellant in any documents whatsoever. He had admittedly not made mention of it in his police report. Neither had he mentioned it to his immediate superior. As pointed out by our learned brother Abdul Kadir Sulaiman JCA in the course of argument and accepted by the learned deputy who had responded to this appeal, this revelation by PW3 was of first impression. In other words, it was at the trial for the very first time that anyone was hearing about this alleged statement. In our judgment, it was incumbent upon the learned trial judge to have approached such statement with utmost caution. That is not to say that PW3 is not an honest and truthful witness. He might be perfectly truthful, yet he might have been confusing this case with another under his investigation. A contemporaneous note made by him either in his investigation diary or in the police report would have been of considerable evidential value. It could have been used by him to refresh his memory under s. 159 of the Evidence Act 1950. It may have satisfied a tribunal trying the case that he was indeed accurate in his recollection of the events. But that was not the case here.

The learned deputy had valiantly sought to sustain the learned judge's point on admissibility by pointing out that the learned judge had indeed found PW3 a credible witness through observation of his demeanor. To that submission, we would cite in answer the following passage in the judgment of Raja Azlan Shah FJ (as he then was) in *Tengku Mahmood v. Public Prosecutor* [1974] 1 MLJ 110:

> As regards authority, there is, I think, very little to be said. It is hardly necessary to go further back than *Tara Singh v. Public Prosecutor* [1949] MLJ 88, 89 in 1948. In that case it was held that impression as to demeanour of a witness must be critically tested against the totality of his evidence. Now, the learned president, it is true, had a great advantage over this court. He saw and heard the witness and I did not. But the demeanour is not always the touch-stone of truth. It is only one ingredient in arriving at a finding of credibility.

Nowhere in his judgment has the learned trial judge warned himself of the necessity of approaching with caution such a first disclosure as was made in the present instance. The learned deputy has frankly conceded this. The upshot is that while the evidence in question may be technically admissible (and we

will say in a moment why) its prejudicial effect far outweighs its probative value. It was technically admissible because in the particular circumstances obtaining in this case, it was difficult, if not impossible for PW3 to have administered a caution to the appellant before the latter made the impugned statement. And for the present purpose, we are prepared to assume that the appellant was under arrest at the material time and therefore entitled to a caution under s. 37A of the Act.

To return to the point we were making, the learned judge had a discretion in the circumstances to exclude the impugned statement on the ground that its prejudicial effect outweighed its probative value. In support of this proposition we rely on the following passage of Lord du Parq in *Noor Mohammad v. King* [1949] AC 182, at p. 192:

> It is right to add, however, that in all such cases the Judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it, desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

The above dictum by Lord du Parq was applied by the Federal Court in *Goi Ching Ang v. Public Prosecutor* [1999] 1 CLJ 829 where at p. 855, Chong Siew Fai CJ (SS) said:

> In short, since the learned trial judge in the instant case under appeal had found that the s. 27 information of the appellant was not voluntarily made, it is irrelevant. It was not the appellant's own statement and was extracted from him in contravention of the privilege against self-incrimination and would be unfair to have it admitted against him. The facts and circumstances of the case show that the s. 27 information obtained has an adverse effect on the fairness of the proceedings so that the learned trial judge ought not to have admitted it.
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> For the aforementioned reasons, we are of the view that the s. 27 information of the appellant ought to have been excluded from evidence in the discretion of the court which was not exercised by the trial judge.

Now we have scrutinized the judgment with care and no where in it have we found the kind of analysis as stated in *Tengku Mahmood (supra)*. Neither are we able to discern any in the judgment, a direction by the learned judge unto

himself that he had addressed the matter and the reasons for exercising his discretion in any particular way. But that still leaves the question whether the statement was rightly admitted in the present case.

Now in the instant case, the purpose for which the evidence was sought to be admitted was to prove that the appellant knew that the packages he held contained a dangerous drug. Here the learned deputy has conceded that there was abundant evidence to invoke the presumption under s. 37(d) of the Act. He says, and we agree with him, that even without the aid of the presumption, the prosecution could still easily prove possession.

It follows therefore, that although the statement was technically admissible, the purpose for which it was sought to be admitted was of little consequence in the light of the other evidence. Accordingly, in our judgment, this was an appropriate case where the learned judge should have exercised the discretion vested in him and excluded the statement as being contrary to justice on the facts of this particular case.

That brings us to the third point. The submission made before us relates to the following passage made in the judgment of the learned judge which reads as follows:

> It is clear from the cross-examination and the submission that no reasonable doubt has been raised in the prosecution case, in which it was clearly shown by direct evidence that the Accused had:
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> a. by inference by his own conduct (*PP v. Badrulsham bin Baharom* [1988] 2 MLJ 585, *Kevin John Barlow v. PP* [1987] 2 CLJ 286; [1987] CLJ (Rep) 139), that he knew of the nature of the thing in the envelopes, that they were dangerous drugs shows knowledge (by inference: *Chan Pean Leon v. PP* [1956] 22 MLJ 237) and possession of the dangerous drugs; and
>
> b. from the amount, manner of packaging, absence of any evidence that the said dangerous drugs were for his own use, and the circumstances he went directly to the public telephone booth, made calls, and without having made conversation, proceeded forth suggests carrying or delivering within the meaning of trafficking in section 2 of the Dangerous Drugs Act (see: *Teh Geok Hock v. PP* [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160, *Ong Ah Chuan v. PP* [1981] MLJ 64 PC):
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> and supported by the presumption either:
>
> i. the fact he had custody and control of the two envelopes, he is presumed, until the contrary is proved, to have possession and knew of the nature of the dangerous drugs contained therein; or alternatively

ii. by the quantity of 17.0 grammes of heroin and monoacetylmorphine, he is presumed, until the contrary is proved, to be trafficking in the said dangerous drugs,

the Court therefore finds that the prosecution had made out a *prima facie* case in accordance with section 180 of the Criminal Procedure Code, and in accordance with section 180 (iii) thereof calls upon the Accused to enter upon his defence.

Counsel for the appellant submitted that this passage is clearly open to the interpretation that the learned judge found the appellant guilty of trafficking by first having resort to 37(d) of the Act and immediately thereafter having recourse to the presumption under s. 37(da) thereof. The learned deputy on the other hand submits that nowhere in the passage in question has the learned judge taken that position. With respect, we are unable to agree with this response.

It is plain, even from a cursory reading of the foregoing passage in his judgment that the learned judge was indeed directing his mind to the presumption under s. 37(d) as establishing possession by the appellant of the dangerous drugs in question and then immediately moving on to the presumption under s. 37(da) to establish trafficking based upon the presumed possession. The latter part of his judgment in the passage already quoted cannot be explained in any other way. This direction actually infringes the rule in *Muhammed Hassan*. It is a case to which we have refered often enough. It is a case that states a principle with which the criminal Bar is so well versed that we find it unnecessary to re-state.

For the reasons already given, this is not a case in which a conviction for trafficking under s. 39B of the Act may be safely sustained. We would accordingly set aside the conviction under s. 39B thereof and substitute it with one under s. 12(2) punishable under s. 39A(2) of the Act.

Having heard arguments on sentence, we are satisfied that in the public interest a deterrent sentence should be imposed on the appellant.

We have taken into account all that Mr. Karpal Singh has put forward by way of mitigation. Our learned brother Alauddin Dato' Mohd Sheriff JCA has drawn our attention to s. 39A(2)(a) of the Act which refers to a minimum of 5 grammes as the trigger for the operation of that section. We are therefore unable to agree with counsel for the appellant that he was carrying a mere 2 grammes more than the trigger point. A more accurate statement would be he was carrying more than three times the trigger point.

In the circumstances, we would therefore impose a sentence of 18 years from date of arrest. The appellant must also suffer a minimum of 10 strokes of the rotan.